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Recommended Citation

Carl Tobias, *The Judicial Conference Report and the Conclusion of Federal Civil Justice Reform*, 175 F.R.D. 351 (1998)

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175 F.R.D. 351

Federal Rules Decisions

1998

THE JUDICIAL CONFERENCE REPORT AND THE CONCLUSION OF FEDERAL CIVIL JUSTICE REFORM

Carl Tobias^{a1}

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The Civil Justice Reform Act (CJRA) of 1990¹ instituted a nationwide experiment with procedures for decreasing expense and delay in federal civil litigation. Congress required all ninety-four federal district courts to adopt civil justice expense and delay reduction plans and to apply cost and delay reduction measures for at least four years.² Congress correspondingly prescribed considerable evaluation of the experimentation which the federal districts undertook. The 1990 legislation mandated that each court annually assess the efficacy of the procedures which the district employed.³ Moreover, Congress required that an “independent organization with expertise in the area of Federal court management” conduct a comprehensive analysis of measures being implemented in the pilot program instituted by ten districts under the CJRA.⁴ Congress also mandated that the Judicial Conference of the United States, the policymaking component of the federal courts, in consultation with the Federal Judicial Center (FJC) and the Administrative Office of the United States Courts, important research arms of the federal courts, thoroughly scrutinize the effectiveness of procedures which five districts applied in the statutorily-prescribed demonstration program.⁵ Furthermore, Congress asked that the Judicial Conference submit to Congress reports on the pilot and demonstration court experimentation and a recommendation on whether the pilot project warranted expansion.⁶

*352 The RAND Corporation, the independent entity which undertook the multi-year examination of the pilot program, completed its evaluation of these districts' experimentation during September 1996.⁷ The FJC, which had responsibility for assessing the demonstration courts, concluded this study in January 1997.⁸ The Judicial Conference submitted its report to Congress during May 1997, and that report is reproduced in last month's advance sheet of *Federal Rules Decisions*.⁹

Because the Judicial Conference report on civil justice reform represents the culmination of this unprecedented experiment with measures for reducing expense and delay, it is important to analyze the Judicial Conference report and the current status of the Civil Justice Reform Act. This essay undertakes that effort. The first section of the essay affords a descriptive assessment of the Judicial Conference report on federal civil justice reform. The second part offers constructive criticisms of the Conference report. The final portion provides suggestions for the future.

I. Descriptive Analysis Of The Judicial Conference Report

The Judicial Conference report begins with an Executive Summary on which I rely substantially in this section because the introductory material succinctly captures the remaining information that appears in the report. Part I of the report describes implementation of the Civil Justice Reform Act. Part II presents alternative measures for decreasing cost and delay which the Judicial Conference developed. Parts III and IV respectively include analyses, comments and recommendations on the CJRA principles and guidelines of litigation management and expense and delay reduction as well as the CJRA techniques for managing litigation and decreasing cost and delay. Part V offers concluding observations regarding the prospects for continued civil justice reform.

A. Statutory Requirements and the Judicial Conference Recommendation

The 1990 Civil Justice Reform Act required that the Judicial Conference “include in its report a recommendation as to whether some or all district courts should be required to include, in their expense and delay reduction plans, the six principles and guidelines of litigation management and cost and delay reduction identified in” 28 U.S.C. § 473(a).¹⁰ Had the Judicial *353 Conference suggested that the pilot court experimentation be extended beyond the ten participating courts, the Conference was to “initiate proceedings for the prescription of rules implementing its recommendation pursuant to” the Rules Enabling Act.¹¹ If the Conference did not propose the pilot program's expansion, the Conference was to “identify alternative, more effective cost and delay reduction programs that should be implemented in light of the findings of the Judicial Conference in its report, and [could] initiate proceedings for the prescription of rules implementing its recommendation, pursuant to” the Rules Enabling Act.¹²

The Conference stated in the report that it had reviewed the independent assessment of the pilot district experimentation conducted by the RAND Corporation, the Federal Judicial Center analysis of the demonstration program, and the experiences of the ninety-four courts in effectuating their expense and delay reduction plans.¹³ The Conference found that the districts had adopted most of the principles, guidelines and techniques in the Civil Justice Reform Act, but the Conference did “not support expansion of the Act's case management principles and guidelines to other courts *as a total package*.”¹⁴

The Judicial Conference premised its suggestion substantially on the RAND study which found that factors apart from judicial case management procedures drive litigation costs and that the pilot court experimentation per se did not seem to reduce significantly expense or delay because the districts were already following most of the statutorily-prescribed measures.¹⁵ The Conference noted the RAND Corporation's conclusion that six mechanisms proposed by the Civil Justice Reform Act are efficacious, when used together, in decreasing delay without increasing expense: “(1) early judicial case management; (2) early setting of the trial schedule; (3) shortening discovery cutoff; (4) periodic public reporting of the status of each judge's docket; (5) conducting scheduling and discovery conferences by telephone; and (6) implementing the advisory group process.”¹⁶ The Judicial Conference report, therefore, provided recommended alternatives to expansion of the pilot program which it based essentially on statutory experimentation as well as findings, commentary and suggestions relating to particular procedures for effective case management.¹⁷ The alternative procedures and recommendations comprise the Conference's alternative cost and delay reduction program as required by the Civil Justice Reform *354 Act.¹⁸ This alternative program included eight measures that the judiciary is to implement, three approaches which require congressional and executive branch cooperation, six recommendations regarding the CJRA principles and guidelines, and six suggestions respecting the CJRA techniques.

B. Judicial Conference Alternative Program

1. Measures that the Judiciary is to Implement

The Conference explored eight measures which the judiciary is to effectuate. First, the Conference suggested that the CJRA advisory group process continue because it facilitated the involvement of parties and attorneys in the administration of justice in all ninety-four courts.¹⁹ The Conference proposed that districts continue employing these groups comprised of federal court users to analyze their dockets and suggest ways of decreasing expense and delay, that districts in consultation with the groups continue conducting regular assessments, and that Congress appropriate the requisite funding to support continuation of the advisory group process.²⁰ Second, the Conference endorsed the CJRA's docket reporting strictures because of their efficacy in

reducing case disposition time.²¹ Third, the Conference recommended that the setting of early and firm trial dates and shorter discovery periods in complex cases be encouraged because the procedures can decrease delay without increasing expense.²² The Conference also remarked that this type of early judicial case management had no effect on lawyer satisfaction or views on fairness.²³

Fourth, the Conference suggested that the efficacious use of magistrate judges should be encouraged partly because the RAND evaluation determined that “some magistrate judges may be substituted for district judges on non-dispositive pre-trial activities without” disadvantages and with increased attorney satisfaction.²⁴ The Conference, therefore, proposed the effective employment of “magistrate judges, consistent with recommendation 65 of the *Long Range Plan for the Federal Courts*,” which found in 1995 that these judicial officers are “indispensable resources readily available to supplement the work of life-tenured district judges in meeting *355 workload demands.”²⁵

Fifth, the Conference recommended that case management responsibilities of chief judges be increased because those officers are important institutional leaders, particularly in facilitating caseflow management.²⁶ Sixth, the Conference proposed that intercircuit and intracircuit judicial assignments be encouraged because they can promote effective case management by helping to decrease backlogged dockets.²⁷ Seventh, the Conference suggested that education regarding effective case management be extended to the whole legal community because this would “greatly facilitate case management efficiency in the federal judicial system.”²⁸ Eighth, the Conference recommended the encouragement of electronic technologies' use in district courts, when appropriate, because those technologies have the potential to save significant time and expense in civil litigation.²⁹

2. Measures Requiring Congressional and Executive Branch Cooperation

The Judicial Conference then considered three measures that require congressional and executive branch cooperation. First, the Conference called for increased recognition of the impact which judicial vacancies have on litigation delay, stating that “thirty-nine of the CJRA advisory group reports cite the length of time required to fill a judicial vacancy as a fundamental cause of delay.”³⁰ The Conference requested that the legislative and executive branches assign high priority to filling these openings promptly.³¹

Second, the Judicial Conference called for greater recognition of the effect that the passage of new criminal and civil statutes, which are beyond the judiciary's control, have on federal district courts' civil dockets and resources.³² The Conference urged Congress to consider the adverse impacts of growing criminal prosecutions, the “federalization” of criminal *356 law, and the creation of more civil causes of action on civil cases' overall disposition as well as the implications of those phenomena for the judiciary's size.³³ The Conference admonished that the failure to balance these inconsistent goals would increase litigation delay as dockets experience overcrowding and that Congress allocate the requisite resources for implementing the legislation which it enacts.³⁴

Third, the Judicial Conference warned that sufficient courtroom space facilitates judicial case management and should be available.³⁵ The Conference stated that having courtrooms available enables judges to resolve cases promptly by setting firm trial dates, thereby fostering settlement of considerable civil litigation and the more expeditious resolution of those lawsuits which actually go to trial.³⁶

3. Recommendations Regarding the CJRA Principles and Guidelines

The Judicial Conference suggested that specific districts continue to ascertain locally whether the courts' dockets require the "track model or the judicial discretion model for their differentiated case management (DCM) systems."³⁷ The Conference endorsed the principles of setting early, firm trial dates and imposing shorter discovery periods because the RAND assessment found that they were two of the most efficacious elements of the Civil Justice Reform Act.³⁸

The Judicial Conference also endorsed the use of discovery management plans in the form of discovery schedules, scheduling orders and staged discovery management.³⁹ The Conference correspondingly recommended that the Judicial Conference Committee on Rules of Practice and Procedure continue its effort to reassess discovery's scope and substance, especially whether the benefits of nationally-uniform requirements override the advantages of locally-developed measures as alternatives to [Federal Rule of Civil Procedure 26\(f\)](#) and the impacts of districts employing additional alternative procedures.⁴⁰ The Judicial Conference concomitantly found that the RAND study did not include sufficient information, other than material implicating mandatory pre-discovery discovery, to make a suggestion respecting the *357 concept of voluntary exchange of information.⁴¹ The Conference, accordingly, proposed that the Committee on Rules of Practice and Procedure reevaluate the need for national consistency in applying [Federal Rule of Civil Procedure 26\(a\)](#) as part of its continuing reexamination of discovery and determine whether the benefits of national uniformity in applying this provision outweigh the advantages of measures developed at the local level.⁴²

The Judicial Conference noted that the CJRA principle requiring counsel to meet and confer before filing discovery motions was included in certain 1993 amendments to [Federal Rules of Civil Procedure 26](#) and [37](#).⁴³ The Conference, therefore, endorsed the concept, remarking that "no further recommendation is necessary."⁴⁴ The Judicial Conference endorsed continued experimentation with appropriate forms of alternatives to dispute resolution (ADR) because numerous districts have found that alternatives to dispute resolution benefit parties, although the RAND study concluded that ADR afforded no "significant positive cost and delay impact."⁴⁵ The Conference, thus, supported the ongoing use of promising alternatives to dispute resolution, suggested that districts continue developing suitable ADR programs, and proposed that the Committee on Rules of Practice and Procedure review courts' application of various alternatives and evaluate whether modifications in the Federal Rules are warranted to increase ADR's role.⁴⁶

4. Recommendations Regarding the CJRA Techniques

The Judicial Conference observed that the 1993 amendment of [Federal Rule of Civil Procedure 26\(f\)](#) prescribed in general terms the submission of joint discovery plans at an initial pretrial conference.⁴⁷ Because the RAND study found that application of this technique did not significantly change time to disposition, the Conference decided against proposing additional requirements but suggested that the Committee on Rules of Practice and Procedure analyze the practice as part of its ongoing consideration of discovery.⁴⁸ The Judicial Conference similarly noted that 1993 amendments in [Federal Rule of Civil Procedure 16\(c\)](#) included the technique of requiring that a representative with power to bind the litigants be present at all *358 pretrial and settlement conferences.⁴⁹ The Conference, therefore, stated that no additional recommendation regarding this procedure was necessary.⁵⁰

The Judicial Conference did not endorse the technique of mandating that lawyers and parties sign requests for discovery extensions or postponements of trials because of the measure's "almost universal rejection."⁵¹ The Conference also supported the deployment of Early Neutral Evaluation as an appropriate form of ADR.⁵² The Judicial Conference recognized that

judicial officers must be accessible to supervise pretrial activities and that magistrate judges' use can lead to more efficient case management in the districts and to attorney satisfaction.⁵³ The Conference, accordingly, supported the effective employment of these judicial officers, including their participation in ADR programs, consistent with the Long Range Plan's Recommendation 65.⁵⁴

C. Concluding Observations

The Judicial Conference, in its concluding remarks, stated that the CJRA had fostered intensive efforts of the bench, bar and additional representatives of litigants to study the circumstances of the districts and experiment with creative ways of managing federal civil litigation and that these efforts would continue to influence federal court business directly and positively.⁵⁵ The Conference subscribed to the RAND study finding that the CJRA process had "raised the consciousness" of the judiciary and attorneys, facilitating actions which make civil cases less protracted and expensive and improving the civil justice system's efficiency and effectiveness.⁵⁶

The Conference pledged that the judiciary would maintain efforts to increase the delivery of justice in civil litigation but admonished that the courts will face numerous challenges and issues relating to civil justice reform.⁵⁷ These include: "(1) increasing speed of disposition while preserving the quality of justice; (2) striking an appropriate balance between national uniformity and local option in development of litigation procedures; (3) assessing the differential financial impact of CJRA-sponsored procedural reforms on various kinds of litigants and on attorneys; (4) evaluating the *359 specific data on the impact of individual case management methods on the speed and cost of civil litigation; and (5) perhaps most importantly, confronting the practical limits to which general rules and procedures can be used to manage litigation."⁵⁸ The Conference promised that the courts would pursue additional improvements in case management "with the needs of justice foremost in mind" while welcoming the continued interest and support of Congress and the Executive Branch, the bar and the public in this effort.⁵⁹

II. Constructive Criticisms Of The Judicial Conference Report

The Judicial Conference apparently attained technical compliance with all of the requirements which the Civil Justice Reform Act imposed on it, and the Conference seems to have reached defensible substantive conclusions. The Conference compiled a report that included an assessment of the pilot program which was premised on a "study conducted by an independent organization with expertise in the area of Federal court management."⁶⁰ The Judicial Conference correspondingly included in its report a recommendation against "expansion of the Act's case management principles and guidelines to other courts *as a total package*"⁶¹ as well as a set of alternative measures which the Conference meant to decrease cost and delay.⁶²

One possible constructive criticism of the Judicial Conference's efforts is that the alternative expense and delay reduction program, which the Judicial Conference recommended, was not sufficiently ambitious, as it called for the application of comparatively few measures, virtually all of which courts have already employed. However, the reform that Congress intended to institute in the Civil Justice Reform Act of 1990 can fairly be characterized as modest, partly "because the courts were already following most of the Act's principles, guidelines, and techniques and more importantly, the cost of litigation was driven by factors other than judicial case management procedures," as the Judicial Conference report and the RAND study astutely observed.⁶³

A significant way that the Judicial Conference might have improved its report would have been to identify additional measures which proved efficacious in decreasing expense or delay. For example, a few districts apparently determined that telephonic

resolution of discovery disputes was *360 effective⁶⁴ and other courts found that increased reliance on magistrate judges was beneficial,⁶⁵ while the alternatives to dispute resolution implemented in the Western District of Missouri, which was a demonstration court, seemingly realized certain savings.⁶⁶ In fairness, the Judicial Conference report alluded to these efforts,⁶⁷ although the Conference might have examined and discussed the endeavors in somewhat greater detail and even included more particularized recommendations regarding them.

Observers could criticize the Judicial Conference for relying too substantially on the RAND Corporation study of the pilot districts or the Federal Judicial Center assessment of the demonstration courts. However, Congress in the Civil Justice Reform Act seemed to contemplate that the Conference would place considerable dependence on those evaluations, while the analyses' expert, comprehensive nature supports Conference use of them.

The Judicial Conference might have been overly protective of the federal judiciary's prerogatives generally and of its role in the national rule revision process specifically as well as too concerned about restoring the procedural status quo that existed when Congress passed the Civil Justice Reform Act.⁶⁸ If the Conference report reflects these views, the perspectives could have been justified by the perceived efficacy of the national amendment process which has served the courts, Congress and the public well for six decades, the confusion and disruption that certain aspects of the CJRA's implementation seemingly created, and the apparently limited effectiveness of the statutorily-prescribed procedures which courts applied.

The Judicial Conference in its report could also have attempted to resolve clearly the question whether the Civil Justice Reform Act and procedures adopted pursuant to the statute actually expired on December 1, 1997, although Congress passed the CJRA and should have primary responsibility for clarifying its applicability. The statutory language which Congress included in the Civil Justice Reform Act of 1990 did not clearly state that the legislation would expire on December 1, 1997.⁶⁹ Moreover, the relevant *361 legislative history which attended passage of the statute was limited and rather ambiguous.⁷⁰ This phrasing and accompanying legislative history could be read as indicating that federal districts might discontinue applying the expense and delay reduction measures on December 1, 1997, but the wording and history might also be interpreted as requiring Congress and the judiciary to make an affirmative decision about reauthorizing the Civil Justice Reform Act and measures which courts prescribed pursuant to the legislation.

Unfortunately, the first session of the 105th Congress recessed in mid-November without conclusively resolving the issue of the statute's continuing applicability, even though it took certain relevant action. Congress passed legislation that specifically authorized continuation of the case reporting requirements in section 476 of the CJRA, the provision under which the Administrative Office prepared semiannual public statistical summaries respecting the status of motions and bench trials that had been pending for more than six months and of cases that had been pending longer than three years.⁷¹ However, the 1997 legislation essentially left section 103(b) as Congress had passed the provision in 1990.⁷²

The most plausible interpretation of the Civil Justice Reform Act's wording and legislative history and the best construction of the congressional activity and the judicial inaction surveyed is that failure to reauthorize the CJRA with greater clarity means that the enactment did expire on December 1. If this reading is accurate, it would correspondingly indicate that any measures which the ninety-four districts adopted or applied under the 1990 statute and which conflict with the Federal Rules of Civil Procedure should also expire.⁷³

III. Suggestions For The Future

Congress or the Judicial Conference should expeditiously resolve the uncertainty about expiration of the Civil Justice Reform Act, because lingering doubt regarding the continuing applicability of the statute and local procedures adopted under it complicate federal civil practice. Congress passed the legislation and is the preferable entity to treat the statute. If Congress does not act, the Judicial Conference might attempt to clarify ^{*362} the issue by clearly informing all ninety-four districts that the CJRA has expired and that inconsistent measures applied pursuant to the legislation must be abolished. Most of the courts would probably comply with Judicial Conference resolution of the question because the Conference speaks with considerable authority on issues of judicial administration and statutory interpretation. In any event, each district could attempt to clarify uncertainty by abrogating local procedures prescribed under the CJRA which conflict with the Federal Rules.

Congress, the Judicial Conference and specific districts might also attempt to identify measures receiving experimentation in addition to those that the Judicial Conference delineated which reduced expense and delay in civil litigation. Congress or the Supreme Court should expeditiously incorporate in the Federal Rules of Civil Procedure the requirements that were extremely effective and would be workable nationwide. The procedures which proved efficacious may warrant consideration in the ordinary process of national civil rule revision. The measures that were less effective, but appeared promising, could be candidates for further experimentation.

Conclusion

Seven years ago, Congress instituted national experimentation with procedures for decreasing cost and delay in civil litigation. All ninety-four districts have adopted and applied these measures that have received comprehensive scrutiny and as to which the Judicial Conference recently issued a report and a recommendation. The Conference did not support expansion of the statute's case management procedures as a total package to other courts, while the Conference proffered an alternative expense and delay reduction program. Congress and the Judicial Conference must promptly resolve the question whether the CJRA has expired because uncertainty regarding this issue promises to complicate federal civil practice. Congress and the Conference should decide which statutory features, apart from those that the Conference included in its alternative program, warrant continuing application, while the federal districts must employ these measures.

Footnotes

- ^{a1} Professor of Law, University of Montana. I wish to thank Peggy Sanner for valuable suggestions, Hank Waters and Fran Wells for valuable research, Cecelia Palmer and Charlotte Wilmerton for processing this piece, as well as Ann and Tom Boone and the Harris Trust for generous, continuing support. I serve on the Ninth Circuit District Local Rules Review Committee and on the Advisory Group that the United States District Court for the District of Montana has appointed under the Civil Justice Reform Act of 1990; however, the views expressed here and errors that remain are mine.
- ¹ See 28 U.S.C. §§ 471-82 (1994); see also Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393(1992).
- ² See 28 U.S.C. § 471 (1994); Judicial Improvements Act of 1990, tit. I, Pub. L. No. 101-650, § 103, 104 Stat. 5089, 5096.
- ³ See 28 U.S.C. § 475 (1994).
- ⁴ See Judicial Improvements Act of 1990, tit. I, Pub. L. No. 101-650, § 105(c)(1), 104 Stat. 5098.
- ⁵ See Judicial Improvements Act of 1990, tit. I, Pub. L. No. 101-650, § 104(c), 104 Stat. 5097. The Federal Judicial Center actually undertook the study.
- ⁶ See Judicial Improvements Act of 1990, tit. I, Pub. L. No. 101-650, §§ 104(d), 105(c), 104 Stat. 5097-98.

- 7 See James S. Kakalik et al., Just, Speedy and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act (1996).
- 8 See Donna Stienstra et al., Report to the Judicial Conference Committee on Court Administration and Case Management, A Study of the Five Demonstration Programs Established Under the Civil Justice Reform Act of 1990 (FJC 1997).
- 9 See Judicial Conference of the United States, The Civil Justice Reform Act of 1990 Final Report, Alternative Proposals for Reduction of Cost and Delay Assessment of Principles, Guidelines and Techniques (1997), *reprinted in* 175 F.R.D. 62 (1997) [hereinafter Judicial Conference Report]. The Conference attached the RAND study as Appendix A and the FJC study as Appendix B to the report.
- 10 See Judicial Improvements Act of 1990, tit. I, Pub. L. No. 101-650, § 105(c)(2)(A), 104 Stat. 5098.
- 11 See Judicial Improvements Act of 1990, tit. I, Pub. L. No. 101-650, § 105(c)(2)(B), 104 Stat. 5098. The Rules Enabling Act, 28 U.S.C. §§ 2071-2074, 2077 (1994), prescribes the process for amending the Federal Rules of Civil Procedure.
- 12 See Judicial Improvements Act of 1990, tit. I, Pub. L. No. 101-650, § 105(c)(2)(C), 104 Stat. 5098. The statute required that the Judicial Conference only submit a “report of the results of the demonstration program” to Congress. See Judicial Improvements Act of 1990, tit. I, Pub. L. No. 101-650, § 104(d), 104 Stat. 5097.
- 13 See Judicial Conference Report, *supra* note 9, at 2, 9, 14-17.
- 14 Judicial Conference Report, *supra* note 9, at 2 (emphasis in original).
- 15 See *id.* at 2, 15.
- 16 *Id.* at 2; see also *id.* at 15-16.
- 17 See *id.* at 2, 9, 16.
- 18 See Judicial Conference Report, *supra* note 9, at 2; see also *supra* note 12 and accompanying text.
- 19 See Judicial Conference Report, *supra* note 9, at 2, 18-19; see also 28 U.S.C. § 478 (1994).
- 20 See Judicial Conference Report, *supra* note 9, at 2, 18-19; see also *supra* note 4 and accompanying text.
- 21 See Judicial Conference Report, *supra* note 9, at 3, 19. See generally Charles Gardner Geyh, *Adverse Publicity as a Means of Reducing Judicial Decision-Making Delay: Periodic Disclosure of Pending Motions, Bench Trials, and Cases Under the Civil Justice Reform Act*, 41 CLEV. ST. L. REV. 511 (1993).
- 22 See Judicial Conference Report, *supra* note 9, at 3, 19-20.
- 23 See *id.*
- 24 See *id.* at 3, 20.
- 25 See *id.*; see also Judicial Conference of the United States, Long Range Plan for the Federal Courts 101-02 (1995). See generally R. Lawrence Dessem, *The Role of the Federal Magistrate Judge in Civil Justice Reform*, 67 ST. JOHN'S L. REV. 799 (1993).
- 26 See Judicial Conference Report, *supra* note 9, at 3, 20.
- 27 See *id.* at 3-4, 20-21; see also Long Range Plan, *supra* note 25, at 98-101; 28 U.S.C. §§ 291-97, 636 (1994). See generally Carl Tobias, *Federal Judicial Selection in a Time of Divided Government*, 47 EMORY L.J. No. 2 (May 1998).
- 28 See Judicial Conference Report, *supra* note 9, at 4, 21.
- 29 See *id.* at 4, 21-23.

- 30 See, e.g., Final Report of the Advisory Group United States District Court for the Eastern District of New York 27-28 (1991); Report of the Civil Justice Reform Act Advisory Group of the United States District Court for the Eastern District of California 51-56 (1991); see also Judicial Conference Report, *supra* note 9, at 4, 21-22.
- 31 See Judicial Conference Report, *supra* note 9, at 4. See generally Gordon Bermant et al., *Judicial Vacancies: An Examination of the Problem and Possible Solutions*, 14 MISS. COL. L. REV. 319 (1994); Tobias, *supra* note 27.
- 32 See Judicial Conference Report, *supra* note 9, at 5, 24-25; see also Long Range Plan, *supra* note 25, at 23-32.
- 33 See Judicial Conference Report, *supra* note 9, at 5, 24-25; see also Gordon Bermant et al., Imposing a Moratorium on the Number of Federal Judges: An Analysis of Arguments and Implications (1993); Carl Tobias, *The New Certiorari and a National Study of the Appeals Courts*, 81 CORNELL L. REV. 1264, 1268-69 (1996).
- 34 See Judicial Conference Report, *supra* note 9, at 5, 24-25.
- 35 See *id.* at 5, 25.
- 36 See *id.*
- 37 See *id.* at 5, 26-28; see also 28 U.S.C. § 473(a)(1) (1994). See generally Stienstra et al., *supra* note 8, at 29-132.
- 38 See Judicial Conference Report, *supra* note 9, at 5, 29-31; see also 28 U.S.C. § 473(a)(2)(B), (C).
- 39 See Judicial Conference Report, *supra* note 9, at 5-6, 31-33; see also 28 U.S.C. § 473(a)(2)(C), (3)(C).
- 40 See Judicial Conference Report, *supra* note 9, at 6, 33.
- 41 See *id.* at 6, 34; see also 28 U.S.C. § 473(a)(4).
- 42 See Judicial Conference Report, *supra* note 9, at 6, 34.
- 43 See Judicial Conference Report, *supra* note 9, at 6, 34-35; see also 28 U.S.C. § 473(a)(5); FED. R. CIV. P. 26(c),(f); FED. R. CIV. P. 37(a)(2), (d).
- 44 See Judicial Conference Report, *supra* note 9, at 6, 35.
- 45 See *id.* at 6, 35-38; see also 28 U.S.C. § 473(a)(6). See generally Stienstra et al., *supra* note 8, at 173-283.
- 46 See Judicial Conference Report, *supra* note 9, at 6, 37-38. See generally Elizabeth Plapinger & Donna Steinstra, ADR and Settlement in the Federal District Courts (FJC 1996).
- 47 See Judicial Conference Report, *supra* note 9, at 6-7, 39-40; see also 28 U.S.C. § 473(b)(1); FED. R. CIV. P. 26(f).
- 48 See Judicial Conference Report, *supra* note 9, at 7, 39-40.
- 49 See *id.* at 7, 40, 42-43; see also FED. R. CIV. P. 16(c).
- 50 See Judicial Conference Report, *supra* note 9, at 7, 41, 43.
- 51 See *id.* at 7, 41; see also 28 U.S.C. § 473(b)(3)(1994).
- 52 See Judicial Conference Report, *supra* note 9, at 7, 41-42; see also 28 U.S.C. § 473(b)(4); *supra* note 46 and accompanying text.
- 53 See Judicial Conference Report, *supra* note 9, at 7, 43-44; see also *supra* notes 24-25 and accompanying text.
- 54 See Judicial Conference Report, *supra* note 9, at 7, 44; see also *supra* note 25 and accompanying text.

- 55 See Judicial Conference Report, *supra* note 9, at 8, 45.
- 56 See *id.*
- 57 See *id.*
- 58 *Id.* at 8, 45-46.
- 59 See *id.* at 8, 46-47.
- 60 See Judicial Improvements Act of 1990, tit. I, [Pub. L. No. 101-650](#), § 105(c), 104 Stat. 5098; see also *supra* notes 4-6, 8, 12-13, 15-16 and accompanying text.
- 61 Judicial Conference Report, *supra* note 9, at 2 (emphasis in original); see also Judicial Improvements Act of 1990, tit. I, [Pub. L. No. 101-650](#), § 105(c)(2)(A), 104 Stat. 5098; *supra* notes 12, 14 and accompanying text.
- 62 See Judicial Conference Report, *supra* note 9, at 2; see also Judicial Improvements Act of 1990, tit. I, [Pub. L. No. 101-650](#), § 105(c)(2)(C), 104 Stat. 5098; *supra* notes 17-36 and accompanying text.
- 63 See Judicial Conference Report, *supra* note 9, at 2.
- 64 See Annual Report of the Advisory Group of the District of Maine Pursuant to the Civil Justice Reform Act 2 (1995); see also Stienstra, *supra* note 8, at 10.
- 65 See, e.g., Annual Assessment of the Civil Justice Expense and Delay Reduction Plan of the United States District Court for the District of Montana 3-4 (1994); see also Carl Tobias, *Reevaluating Federal Civil Justice Reform in Montana*, 56 MONT. L. REV. 307, 313 (1995); Report of the Civil Justice Reform Act Advisory Group to the United States District Court for the District of Oregon Appointed Under the Civil Justice Reform Act of 1990 7, 17-18 (1991).
- 66 See Stienstra et al., *supra* note 8, at 215-82; see also Carl Tobias, *Civil Justice Reform in the Western District of Missouri*, 58 MO. L. REV. 335 (1993).
- 67 See, e.g., Judicial Conference Report, *supra* note 9, at 2-3, 6, 20, 35-38; see also *supra* notes 16, 24-25, 45-46 and accompanying text.
- 68 I rely in this paragraph on Lauren Robel, *Mandatory Disclosure and Local Abrogation: In Search of a Theory For Optional Rules*, 14 REV. LITIGATION 49 (1994); Carl Tobias, *Civil Justice Reform Sunset*, 1998 U. ILL. L. REV. No. 2 (Mar. 1998); see also Carl Tobias, *Improving the 1988 and 1990 Judicial Improvements Acts*, 46 STAN. L. REV. 1589, 1627-34 (1994).
- 69 The statute provides that the “requirements set forth in sections 471 through 478 of title 28, United States Code [, the CJRA] shall remain in effect for seven years after” the December 1, 1990 date of enactment. See Judicial Improvements Act of 1990, tit. I, [Pub. L. No. 101-650](#), § 103(b)(2), 104 Stat. 5096.
- 70 Subsection (b)(2) subjects sections 471 through 478 of the Civil Justice Reform Act to a seven-year sunset provision so that those sections can be thoroughly tested. Upon the expiration of the seven-year period following enactment, Federal district courts are no longer required to operate pursuant to the civil justice expense and delay reduction plans mandated by Title I. Congress and the courts then will have a chance to evaluate those provisions and, if warranted, reauthorize them. See [S. Rep. No. 101-416](#), 101st Cong. 63 (1990), reprinted in 1990 U.S.C.C.A.N. 6802.
- 71 See [Pub. L. No. 105-53](#), § 2, 111 Stat. 1173; see also 28 U.S.C. § 476 (1994); *supra* notes 16, 21 and accompanying text.
- 72 See [Pub. L. No. 105-53](#), § 2, 111 Stat. 1173; see also *supra* notes 69-70 and accompanying text.
- 73 See 28 U.S.C. § 2071(a) (1994); [FED. R. CIV. P. 83](#). One minor set of exceptions to the ideas regarding inconsistent measures prescribed pursuant to the CJRA is the provision in certain 1993 federal civil rules amendments, principally governing discovery,

which authorizes the courts to promulgate and implement procedures that vary from the Federal Rules. *See, e.g.*, [FED. R. CIV. P. 26\(a\)\(1\)](#).

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